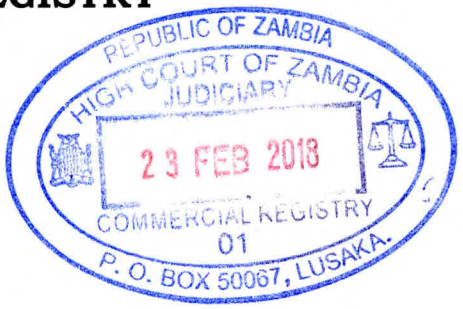
IN THE HIGH COURT FOR ZAMBIA **2017/HPC/0060**

AT THE COMMERCIAL REGISTRY

HOLDEN AT LUSAKA



(Civil Jurisdiction)

BETWEEN

DEVELOPMENT BANK OF ZAMBIA **APPLICANT**

And

ROZHO ENTERPRISES LTD **1ST RESPONDENT**

ZHOROMI KAZHINGA **2ND RESPONDENT**

RODINAH CHIVWETA KAZHINGA **3RD RESPONDENT**

Before the Hon. Madam Justice Irene Zeko Mbewe.

For the Applicant: *Mr. M M Nkonde Legal Counsel DBZ*

For the Respondents: *N/A*

J U D G M E N T

Cases Referred To:

1. *Courtyard Hotel Ltd and Others v First National Bank Zambia Ltd and Another SCZ Appeal No. 006/2015.*

2. *Reeves Malambo v Patco Agro Industries Limited SCZ Judgment No. 20 of 2007*
3. *S. Brian Musonda (Receiver of First Merchant Bank (Z) Limited v Hyper Food Products Ltd and Others (1999) ZR 124 SC.*
4. *G & C Kreglinger & New Patagonia Meat & Cold Storage Ltd (1913) A.C. 25*
5. *Cheltenham and Gloucestershire v Norgen (1996) 1 WLR 343*
6. *Kanjala Hills Lodge Limited and Another v Stanbic [2012] 2 ZR 172*

Legislation and Other Works Referred To:

1. *High Court Rules, Cap 27 of the Laws of Zambia*
2. *Black's Law Dictionary, 7th Edition, Thomson Reuters*
3. *Halsbury's Law of England Volume 32 paragraph 737*

The Applicant commenced legal action against the Respondents herein by way of Originating Summons claiming for the following reliefs:

1. An Order for the payment by the Respondents of all sums due to the Applicant under the Facility Letters dated 9th October 2014 and 27th July 2016 respectively which sums stood at ZMW3,328,421.86 as at 7th February 2017.
2. Interest therein.
3. Delivery up by the 2nd Respondent to the applicant of the mortgaged property, namely stand No. 7062/M Lusaka.
4. An Order of Foreclosure.

5. An Order of sale of the Mortgaged property.
6. And further relief, an Order against the 2nd Respondent and 3rd Respondents as Guarantors for payment of the said sums of ZMW3,328,421.86 and ZMW943,013.76 and interest thereon.
7. Any other relief the court may deem just and equitable.

The application is supported by an affidavit deposed to by Mr. Jala Hapunda the Risk Officer in the Applicant Bank. The salient facts are that by a facility letter dated 9th October 2014 the Applicant extended to the 1st Respondent a long term loan and a working capital loan of ZMW2,344,000 and ZMW636,000 respectively (Exhibit "JH1"). That the 1st Respondent was entitled to a grace period of two months on principal repayments. The long term loan would be repayable in eighty-four (84) monthly instalments and the working capital in eighteen (18) monthly instalments. The agreed rate of interest was subject to change. The first facility letter was secured by a Third Party Mortgage over Stand No. 7062/M off Mumbwa Road Lusaka, a debenture over all fixed and floating assets of the company, an Agricultural Charge, Directors Guarantee and a Subordination Agreement. The security documents were duly

executed (Exhibit "JH2-6"). According to the Applicant, it was an agreed term that the 1st Respondent would make payment by the due date and in the event of default, the loan amount including any interest outstanding would become due and payable and the Applicant would be entitled to exercise any remedies available to it at law. That under Clause 1 of the Guarantee executed by the 2nd and 3rd Respondent as primary obligators, in the event of default by the 1st Respondent they covenanted to pay the Applicant all outstanding amounts under the first facility letter (Exhibit "JH 5").

That sometime in 2016, at the request of the 1st Respondent, the Applicant and 1st Respondent execute a second facility letter dated 27th July 2016 by which the loans were restricted in order to ease pressure of the loan obligations on the 1st Respondent (Exhibit "JH7"). That by virtue of the second facility letter, the working capital loan was converted into a long term loan repayable in sixty-five (65) monthly instalments with the second long term loan payable in seventy (70) monthly instalments. The second facility letter in respect to the second long term loan allowed for a grace period of two (2) months before accrual of interest. That despite the

restructuring, the 1st Respondent defaulted and the letters of demand remained unheeded (Exhibit "JH 8-10"). That written demands for payment were made on the 2nd and 3rd Respondent pursuant to the guarantee (Exhibit "JH11-12"). That a computation of the outstanding amounts including interest as at 7th February 2017 on the loans stand at ZMW3,328,421.86 and ZMW943,013.76 respectively (Exhibits "JH13-14"). That the Respondents herein are truly indebted to the Applicant who is desirous of enforcing its rights under the security documents.

The 1st Respondent opposed the application by way of affidavit dated 16th March 2017 deposed to by Zhoromi Kazhinga the director in the 1st Respondent and is the 2nd Respondent herein. It is deposed that on 9th October 2014, the 1st Respondent obtained loan facilities from the Applicant as working capital for purposes of rearing layer chickens. That it was a term of the loan facility that settlement would be in monthly instalments until full repayment over a period of seven (7) years arising from proceeds of the sell of chickens and eggs procured from the loan facility by the 1st Respondent. That the 1st Respondent experienced a downturn due

to a sudden and sharp decline or breakdown in general financial market fundamentals, general economic malaise and skyrocketing of the exchange rate leading to the escalation of the cost of farming inputs such as chicken feed and vaccines, which then resulted in a loss of profits. That the Applicant was informed about the turn in events by letters dated 14th October 2015 and 7th March 2015 (Exhibit "ZK 2"). According to the deponent, there was a breakout of the New Castle disease affecting the chicken stock, and consequently egg production dropped from 80% to 20% resulting in crippling financial hardships and constraints. That the 1st Respondent failed to service the monthly loan facilities in full and attend to its operational costs and expenses. It is deposed that the 1st Respondent has been periodically servicing the loan facilities and continues to do so.

That on 27th July 2016, the Applicant varied the loan facilities and charged the Respondent a restructuring fee in the sum of ZMW15,349.22 which was duly paid by the 1st Respondent. That the 1st Respondent was given a moratorium of two (2) months after the restructuring and the monthly instalments were payable in

seventy (70) months until 2022 (Exhibit "ZK 3"). That despite the loan facilities being varied and the 1st Respondent paying the restructuring fee, the Applicant refused to effect the variation of the said loan facilities. According to the 1st Respondent, the Applicant is in breach of its duty of care to a customer for no apparent reason. That this was perpetuated by the malice of Duncan Mfula the Applicant's employee (Exhibit "ZK 4"). That despite the challenges experienced by the 1st Respondent, it is desirous of exercising its equitable right of redemption in respect of the mortgaged property and make good its indebtedness to the Applicant, and that reasonable and good prospects exist in settling the loan facilities. That the 1st Respondent has been making repayments to the Applicant on a monthly basis and has exercised prudency in the management of the business. That as an example of the success of the Applicant's financing business venture, the Applicant in a television documentary showcased the 1st Respondent's farm. It is deposed that the 1st Respondent's business is back on track and will by June 2017 service the loan facilities on a monthly instalment basis and clear any backlog in monthly instalments. According to the deponent, the 1st Respondent

has the right to pay off the loan facilities until the year 2022, and not to have the mortgaged properties foreclosed and sold. That this Court has the power and authority to allow the 1st Respondent to exercise its equitable right of redemption in respect to the mortgaged property by allowing the 1st Respondent to continue servicing the loan facilities until full payment or settlement in 2022. That the valuation of the mortgaged property is ZMW6,500,000.00 as at January 2016 which far exceeds the claimed amount (Exhibit "ZK 5"). That the 1st Respondent ought to be allowed to sell a portion of the mortgaged property and apply the proceeds towards the loan facility redemption. That it will be grossly unfair and inequitable if the 1st Respondent were not allowed to exercise its equitable right of redemption. That if the Applicant proceeds to foreclose and sell the mortgaged property, the 1st Respondent's business employees will be prejudiced. It is the 1st Respondent's prayer that the Court grants an order of the equitable right of redemption by allowing the 1st Respondent to repay in monthly instalments the loan facilities until 2022.

The Applicant filed an affidavit in reply dated 4th May 2017 and deposed that the Applicant was fully aware of the shift in market fundamentals that occurred subsequent to the approval and disbursements of the loan to the 1st Respondent, and at the behest of the 1st Respondent restructured the loans in order to ease the repayment obligations and allow the 1st Respondent's business to recover. That the working capital loan was refinanced by a second long term loan which was payable in seventy (70) monthly instalments subject to a grace period of two months. That whilst the 1st Respondent was not obligated to make any principal repayments during the grace period, it was obligated to make interest payments on the second long term loan and pursuant to Clause 4.2 of the second facility letter, interest would continue to be charged during the grace period (Exhibit "JH 7" in supporting affidavit). That there was no grace period given in respect to the first long term loan under the second facility letter. That the variation in repayment terms resulting from the restructured loans was duly effected by the loan statement (Exhibit "JH 15"). That there has never been any malice intent whatsoever in dealing with the 1st Respondent.

It is deposed that the 1st Respondent agreed to be bound by the terms thereof of the first and second facility letter including the stipulated interest rates and payment terms. That the 1st Respondent cannot continue to enjoy its rights under the facility letter when it has consistently defaulted in making payments to the Applicant. That the 1st Respondent has not been servicing the loans as dictated by the terms and conditions of the facility letters (Exhibits "JH 13-14"). That during the period January 2016 to January 2017, the 1st Respondent made a total repayment amounting to ZMW70,297.12 towards arrears of ZMW1,605,676.24. That no repayments have been made in the year 2017 to demonstrate that the 1st Respondent is now in a position to make payments in the future. That both the market value and forced sale value in the Valuation Report are below the sum being claimed by the Applicant. That if the Applicant is not allowed to immediately exercise the power of foreclosure and possession, there is a real danger that the value of the security may not be sufficient to satisfy the outstanding amount, as interest will continue accruing on the principal sum.

That the claimed figure in the Originating Summons is neither illegal nor speculative and is based on the facility letters as agreed to by the 1st Respondent. That it would be unfair and unjust for the Applicant in the light of the 1st Respondent's default to be prevented from exercising the powers of foreclosure and exercise the power of sale in respect to the mortgaged property.

The Applicant filed skeleton arguments dated 10th February 2017 and relied on **Order 30 Rule 14 High Court Rules, Cap 27 of the Laws of Zambia.** Reliance was further placed on **Section 19** of the **Conveyancing and Law of Real Property Act 1881** which sets out the powers of a mortgagee. In articulating the argument in respect to the remedies of foreclosure and sale which the Applicant is entitled to, the Court's attention was drawn to the case of **Courtyard Hotel Limited and Others v First National Bank Zambia Limited and Another SCZ Appeal No. 006/2015**[1] and **Reeves Malambo v PATCO Agro Industries Limited SCZ Judgment No. 20 of 2007**[2].

In terms of the Guarantee made by the 2nd and 3rd Respondents, reliance was placed on the learned Authors of **Halsbury's Law of**

England 4th Edition. It is argued that since the 2nd and 3rd Respondents undertook to be answerable for the 1st Respondent's default, the guarantee is enforceable.

In the 1st Respondent's skeleton argument filed on 16th March 2017, Counsel argues that it is the policy of the law to allow a party to settle the loan facility by enlarging time as opposed to foreclosing. The case of **S. Brian Musonda (Receiver of First Merchant Bank (Z) Limited (In Receivership) v Hyper Food Products Ltd & Others (1999) ZR 124 SC[3]** was cited. Counsel argues that a mortgage is redeemable, and it is not in the interest of the laws to sell the mortgaged property where a party has demonstrated reasonable prospects to settle the loan facility and placed reliance on the case of **G and C Kreglinger and New Patagonia Meat and Cold Storage Limited (1913) AC 25[4].** Counsel contends that the 1st Respondent be allowed to exercise their equity of redemption as there exists great and reasonable prospects of the loan facility being settled by the 1st Respondent. In terms of the submission as to what constitutes a reasonable time, the case of **Cheltenham and Gloucestershire v Norgen (1996) 1 WLR 343[5]** was cited.

At the hearing, there was no appearance from the Respondents or their Counsel. I proceeded to hear the matter as there was proof that the Respondents were aware of the hearing and there was no explanation as to the Respondents absence. The dispute for determination will be considered from the affidavit evidence, skeleton arguments and list of authorities submitted by both parties.

At the hearing of this matter, Counsel for the Applicant relied on the supporting affidavit and affidavit in reply, skeleton arguments and list of authorities. Counsel urged the Court to grant the reliefs prayed for in the Originating Summons.

From the materials and affidavit evidence before this Court, I find that the facts of this case are largely undisputed. The Applicant's case as stated in the Originating Summons and supporting affidavit is that the 1st Respondent was availed a loan facility dated 9th October 2014 and 27th July 2016 which as at 7th February 2017 stands at ZMW3,328,421.86 (Exhibit "JH 1"). That as security, the 1st Respondent pledged Stand No. 7062/M Lusaka and a legal mortgage was duly registered, a debenture over the fixed and

floating assets of the Company, agricultural charge, director's guarantee and a Subordinate Agreement (Exhibits JH2-6"). A perusal of the bank statements show that the 1st Respondent has defaulted. I find that the 1st Respondent has not challenged the facts made out by the Applicant as it is not disputing its indebtedness to the Applicant as evidenced by paragraph 11 and 12 of its affidavit in opposition which states as follows:

> *"11. That the 1st Respondent is and at all material times been extremely desirous of exercising its equitable right of redemption in respect of the mortgaged property from and accordingly make good its indebtedness to the Applicant and there are reasonable and good prospects or chances of the 1st Respondent to settle the loan facilities and further despite the challenges experienced by the 1st Respondents to the Applicant every month and has been prudent in the management of the business to the extent that the 1st Respondent's Farm has been a subject of a television documentary by the Applicant on the successes of its financing of the business ventures in Zambia."*

12. *That in fact the 1st Respondent's business has since gotten back on track following the containment of the disease outbreak that ravaged the chicken farming sector aforesaid and that the 1st Respondent will by June 2017 be able to service the loan facilities in monthly instalments and also clear any backlog in monthly instalments".*

Both facility letters had a duration of 7 years from date of disbursement and these terms were accepted by the 1st Respondent. That on the due date, the 1st Respondent did not make the monthly instalments as set out in the terms of the facility letter. The 1st Respondent argues that the long term facility is up to 2022, and is willing to make payments, and to that effect made an undertaking to pay monthly instalments from June 2017. The 1st Respondent has not substantiated this by adducing evidence of any bank transfers or cheques made towards liquidating its debt with the Applicant. The reason the 1st Respondent has not done so is simple as no payments have been made to the Applicant, and I opine that the Respondents are procrastinating and I see no reason to deny the Applicant the reliefs as prayed. I take the position that whoever

secures a loan from a bank under agreed terms is obliged by law to pay the same and the lender is mandated to recover the same in the event of default. I find that the 1st Respondent is indebted to the Applicant in the claimed sum of ZMW3,328,421.86 and ZMW943,013.76 as at 7th February 2017.

The 1st Respondent argues that it be allowed to exercise their equity of redemption as there exists great and reasonable prospects of the loan facility being settled by the 1st Respondent. In respect to the amount owing, it is trite that once a mortgagor falls into arrears of monthly instalments, the whole amount outstanding on the loan becomes due and recoverable. It is trite that a mortgagee has several remedies available to it which are cumulative, namely foreclosure, delivery of possession and exercising the power of sale. The above principles have been construed and applied by the Supreme Court in the case of **S Brian Musonda (Receiver of First Merchant Bank Zambia Limited v Hyper Food Products [1999] ZR 124**. I further am guided by the Supreme Court in the case of **Kanjala Hills Lodge Limited and Another v Stanbic [2012] 2 ZR 172**[6] where it held as follows:

"Once there is a default on a condition such as the default of a repayment instalment, the mortgagee becomes entitled to pursue all the remedies available to him. In those circumstances the Court, in exercise of its powers to afford the mortgagor the equity of redemption is duty-bound to prescribe a reasonable period within which the mortgagee may wait before enjoying the fruits of his relief. "

In the English case of **Cheltenham and Gloucestershire v Norgen** which is persuasive and cited by Counsel for the Respondents, the case set out useful guidelines in determining what constitutes a reasonable period. Having entered Judgment in favour of the Applicant in the claimed sum of ZMW3,328,421.86 and ZMW943,013.76 as at 7th February 2017, and arising from the authority stated above, I am duty bound to prescribe a reasonable period within which the mortgagor shall pay the Judgment debt. Before I do so, the 1st Respondent argues that the Applicant's claim is speculative and illegal as the mortgaged property is valued at ZMW6,500,000 as attested by a Valuation Report as at January 2017. This argument holds no water as it is settled law that once

there is default by a mortgagor, a mortgagee has cumulative remedies available to it. In any case, where a mortgaged property is valued more than the money borrowed and if sold by the mortgagee, the mortgagee will have a duty to the mortgagor to account for the residue or balance. If the 1st Respondent is apprehensive that the mortgaged property's value exceeds the borrowed amount, which argument the Applicant disputes, this position is succinctly addressed by the learned Authors of Halsbury's **Laws of England Volume 32 paragraph 737** as follows:

> *"Money arising from a sale is applicable in the first instance to the discharge of any prior encumbrances to which sale is not made subject or to the payments into Court of a sum to meet any prior encumbrances; the balance or whole as the case may be is held by the mortgagee in trust to be applied first in payment of all costs, charges and expenses property incurred by him as incident to the sale or any attempted sale or otherwise, secondly in discharge of the mortgagee money, interested and costs and other money if any due under the mortgage; and the residue to be paid to the person entitled to be*

mortgaged property or authorized to give receipts for the proceeds of the sale."

The 1st Respondent's contention is therefore untenable.

As security for the loans availed to the 1st Respondent, the 2nd and 3rd Respondent guaranteed the 1st Respondent's loan facilities. In **Black's Law Dictionary, 7th Edition, Thomson Reuters** at page 711, a guarantee is defined as follows:

"A guarantee is stated to be the assurance that a contract or legal act will be duly carried out. A guarantee clause is stated in a contract, deed or mortgage by which one person promises to pay the obligation of another... It is settled that the liability of a guarantor becomes due or mature immediately the borrower becomes unable to settle its outstanding debt."

The Court associates itself with the above principles. A perusal of the record shows the Unlimited and Irrevocable Director's Guarantee wherein the 2nd and 3rd Respondent are jointly and severally guarantors (Exhibit "JH 15"). This Guarantee constitutes a legally binding document and the 2nd and 3rd Respondent are inextricably tied and bound by its terms, and it forms the basis for

the mutual reciprocity of legal obligations between the parties. The duty of this Court is to construe and give effect to the terms as agreed between the parties herein. I have carefully read the terms of the said Guarantee and it is not a matter of dispute that the 2nd and 3rd Respondent clearly gave a binding undertaking that their liability becomes due or matures immediately the 1st Respondent as a borrower is unable to settle its outstanding debt. Clause 1 of the Guarantee reads as follows:

> *"to pay the outstanding debt should the 1st Respondent default for more than thirty (30) days in the payment of such principal monies, interest or the other monies the Guarantors shall forthwith pay to the Applicant on demand."*

Arising from the aforesaid, it is obvious that the due date for payment by the 1st Respondent has long lapsed and therefore the 2nd and 3rd Respondent are liable to pay the Applicant the sum of ZMW3,328,421.86 and ZMW943,013.76, moreso that a guarantor's liability crystallizes on default. On all accounts, I find that the 1st Respondent has clearly failed to live up to its various commitments to the Applicant. I have noted that the 1st Respondent went to

lengths to explain how the economic malaise affected its business. Notwithstanding, I opine that business is about taking risks and inter alia includes exchange rate and interest rate fluctuations which impacts are felt by everyone operating in that environment. Accordingly as a business entity and borrower, one is expected to remodel one's business plan to adapt to the evolving environment which is dynamic in nature. The evidence in fact shows that the 1st Respondent in recognition of the change in the market dynamics, tried to mitigate its circumstance, and in fact re-negotiated the facility but still failed to make good and defaulted in its obligations to the Applicant. The Court will not come to the aid of a wrongdoer.

In summation, the Applicant's claim succeeds and I enter Judgment in favour of the Applicant in the sum of ZMW3,328,421.86 and ZMW943,013.76 plus interest at the short term deposit rate from date of Originating Summons to date of Judgment and thereafter at the commercial lending rate until full payment. This amount is to be paid within seventy (70) days of the date of Judgment and in default, the Applicant is at liberty to foreclose and take possession of the mortgaged property being

Stand No. 7062/M Lusaka and exercise the power of sale without further recourse to this Court.

In the event that the sale of the mortgaged property does not extinguish the Judgment debt, the Applicant shall enforce the Unlimited and irrevocable Director's Guarantee against the 2nd and 3rd Respondent and the fixed and floating charge.

Costs to the Applicant to be taxed in default of agreement.

Leave to appeal granted.

Dated in Lusaka this 23rd day of February 2018.

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HON. IRENE ZEKO MBEWE
HIGH COURT JUDGE